No. 402

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

J. I. CASE COMPANY, HARRY G. BARR, JOHN T. BROWN, L. R. CLAUSEN, WM. J. GREDE, E. P. HAMILTON, WM. B. PETERS, and MARC B. ROJTMAN,

Petitioners,

vs.

CARL H. BORAK, for and on behalf of himself and all of the other common stockholders of J. I. Case Company who are similarly situated to him,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF J. I. CASE COMPANY

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ARGUMENT.

I. THE DEFENDANTS MAKE NO CONCESSIONS AS TO ANY REMEDIES IMPLIED BY SECTION 14(a).

The Plaintiff-Respondent asserts that we have conceded the existence of a private right to prospective relief for

violations of Section 14(a) of the Securities Exchange Act. From this he concludes that it is reasonable also to imply a private action for retrospective relief. The Plaintiff's position rests upon the following language from our brief, at page 10:

> "We do not question the private right of shareholders under the Act, in addition to the rights of the Commission, to seek prospective relief of injunction in such circumstances."

Perhaps we should have used the word "argue" instead of "question". We do not believe that this language requires interpretation as a concession of the existence of a private right of action for prospective relief from threatened violations of Section 14(a) and certainly such was not intended. Furthermore, the reasons which might justify a court, in exercise of its general equity jurisdiction, in granting injunctive relief against a threatened unlawful act clearly do not necessarily justify the creation of a new remedy for retrospective relief. In any event, the Case Company wishes not to embark on such an inquiry or to make any concession that there is any prospective or retrospective remedy implied in the Section. The point is simply that the existence or non-existence of a private action for prospective relief is not an issue raised by the facts alleged in this case.

II. THE ACT NEITHER CREATES NOR CONTEMPLATES PRIVATE ACTIONS FOR VIOLATIONS OF SECTION 14(a).

A. No Such Private Actions are Expressly Created.

Neither the brief of the Plaintiff nor that of the Securities and Exchange Commission fairly faces the fact that Congress spelled out definite remedies with provisions for security for expenses and limitations periods in each of

Sections 9(e), 16(b) and 18(a), but provided no private remedy for a violation of Section 14(a). In fact, the remedies created by Section 18(a) run in favor of persons injured by the very same violations of the Act alleged by the Plaintiff, *i.e.* the use of a false or misleading proxy statement. Section 18(a) expressly and unambiguously creates an action in favor of persons who are injured by purchasing or selling a security in reliance upon a false or misleading statement. Because no purchase or sale is involved here and Section 18(a) is therefore not applicable, the Plaintiff seeks to force a construction of Section 14(a) as though it contained the same language creating a private remedy as Section 18(a), but without the conditions imposed by Section 18(a). When Congress omitted remedies for persons who, like the Plaintiff, did not purchase or sell, is it not clear that Congress did not intend any remedy in that situation?

Sections 9(e) and 18(a) expressly provide that the Plaintiff may be required to furnish an undertaking for expenses, and 9(e), 16(b), and 18(a) all provide specific limitation periods prescribing the time in which actions may be brought. The Plaintiff and the Commission would have the Court believe that where Congress did not provide a remedy, as in Section 14(a), Congress intended that the courts should create such remedies as *they* feel are appropriate, and without the safeguards of security for expenses or limitation periods which apply to expressly created actions. That is, Congress, when it did not provide a remedy, intended to confer by implication a much broader and more sweeping remedy than when it specifically spelled one out. We suggest that this contention ascribes to Congress a most bizarre piece of legislative draftsmanship; of course Congress intended no such construction. The contention of the Plaintiff and the Com-

mission hardly seems to accord to Congress the courtesy and respect we owe to the intelligence of the legislative branch of the Government.

Additionally, both briefs seem to suggest that seeking to find Congressional intent from the language used in a statute is just old-fogyish, and that the modern approach is for courts to determine the dominating purpose of an act and then insert what they believe would be socially desirable provisions in the statute—by implication. This approach certainly should be applied with the greatest of caution lest we get lost in an uncharteded sea of decision by economic views rather than by application of time-honored principles, such as the *"expressio unius"* principle, to determine legislative intent.

B. Section 27 Does Not Authorize or Contemplate Any Actions Which Are Not Expressly Created By the Other Sections of the Act.

The Plaintiff attempts to overcome the fact that Congress did not expressly create an action in his favor by contending that Section 27 (15 U.S.C. §78aa) authorizes actions other than those expressly created in the Act. The Plaintiff's total argument is that

> "The plain language of Section 27 is the best refutation of [the] absurd argument [that §27 is *not* a general grant of jurisdiction in the sense of *Bell* v. *Hood*]."
>
> Plaintiff's Brief p. 35.

Section 27 *is not* a general grant of jurisdiction in the sense that Congress said to the federal district courts, "here is the Act, you are hereby given carte blanche to enforce it." Section 27 can be termed a general grant of jurisdiction only in the sense that Congress gave exclusive jurisdiction to the district courts of all actions ex-

pressly created or authorized by the other Sections of the Act. That is, it designates where these actions must be brought. However, no talismanic benefits are to be derived from invoking the phrase "general grant of jurisdiction to enforce the statute" (*Bell* v. *Hood*, 327 U.S. 368 (1946) discussed at p. 23 of Plaintiff's Brief). The germane inquiry is simply whether as a matter of statutory interpretation, Section 27 creates or authorizes any private actions which are not expressly created elsewhere in the Act.

Section 27 speaks of "violations of this title, or the rules and regulations thereunder", "suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder", "criminal proceedings", and "suits to enjoin any violation". There is no language in Section 27 which refers to any actions other than the criminal actions, private actions, and actions to enforce or enjoin by the Commission which are expressly created or authorized by *other* sections of the Act. Furthermore, there is no indication whatsoever that in using this language Congress contemplated creating any new actions other than those expressly created elsewhere. Here again, the Plaintiff and the Commission would have the courts rewrite Section 27 to provide "In addition to those private actions created or authorized by other Sections of this title, any person alleging any injury by a violation of any other provision of this title may also bring an action hereunder for damages or suit for appropriate equitable relief". Congress intended no such thing.

C. The Vast Extent of the Proposed Expansion of Section 14(a) by Implication.

Throughout the briefs of the Plaintiff and of the Solicitor General on behalf of the Securities and Exchange Commission are found a great variety of provisions which

they contend should be incorporated by implication into Section 14. For instance, the Plaintiff argues that no state law provisions with respect to security for expenses or the like are to be applicable. They also argue that the power given to the federal district courts is completely without limit with respect either to the granting of any money relief or to the rearrangement and readjustment of the merger terms. (See Commission Brief, p. 31). As a demonstration of how far their argument goes, we have endeavored to put into writing the proposed additions to Section 14 which Plaintiff and the Commission directly or indirectly argue are already there by implication. The sub-sections they advocate might read as follows:

> "14(c) Any stockholder who alleges that in a merger proceeding involving his company, a proxy was used in contravention of the rules and regulations of the Commission as provided in (a) above shall be entitled to bring an action under Section 27 of this title.[1] In such action provisions of state law, such as requirements for securities for costs, statutes of limitations or appraisal statutes, even though part of the state merger law under which the merger was consummated, shall not apply to the plaintiff, nor shall the court require security for costs to be posted by any plaintiff unless expressly provided for by federal statute hereinafter enacted.[2]
>
> "14(d) If after a trial the court shall find that any proxies were utilized pursuant to a proxy statement which was in any respect in violation of the rules and regulations, as specified above, such as by omission, whether intentional or inadvertent, to state a material fact, then such proxies shall be declared void as is

[1] See Plaintiff's Brief, p. 20, *et seq.*

[2] See Plaintiff's Brief, p. 43, *et seq.*

provided in Section 29, and the agreement for merger and the merger consummated pursuant thereto shall likewise be declared void.[1]

"14(e) In the event of such finding as set forth in (d) above, the court shall be empowered after due hearing to award money damages against the corporations concerned, its defendant directors or other defendant persons payable to the plaintiff and to such other members of his class as the court may adjudge and shall impose costs as the court may deem equitable.[2]

"14(f) The court may also require the corporation to issue new or additional securities to the plaintiff and to members of his class as the court may deem just, and in general the court may make other *readjustment of the terms of the merger*[3] as the court may determine to be just and equitable."

We believe that while the above may seem extreme, it is a fair presentation of the positions directly or implicitly taken by the Plaintiff and the Commission in their briefs as to the implied scope of Section 14.

It also follows from the positions taken by the Plaintiff and the Commission that in making "readjustments of the terms of the merger", the district courts would inevitably have to consider and balance out, in addition to the equities of all the different interested persons, the financial and economic situation of the merging corpora-

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[1] See Plaintiff's Third Amended and Supplemental Complaint, R. 179 at 197.

[2] See Plaintiff's Third Amended and Supplemental Complaint, R. 179 at 197.

[3] The italicized clause is the recommendation in the Commission brief, p. 31. See also Plaintiff's Third Amended and Supplemental Complaint, R. 179 at 197.

tions as of the time of the merger, the changes in the resulting merged corporation up to the time of the proposed "readjustment," and the changes that might, in the court's opinion, take place in the future, up to the final issuance of securities contemplated by the "readjustment." This would require of the federal District courts almost superhuman qualities of judgment and financial and economic wisdom and foresight, contrary to the traditional reluctance of equity to become embroiled in the affairs of running a business.

We further suggest that if an amendment to Section 14 along the above lines were proposed by the Commission to Congress the appropriate committees of the Senate and House would give the proposal short shrift.

III. THE BRIEFS OF THE PLAINTIFF AND THE COMMISSION UNDERSTATE THE REMEDIES NOW AVAILABLE FOR THE PROTECTION OF A DEFRAUDED INVESTOR.

Both briefs seem to assume that a new retrospective private remedy under Section 14 is needed to supplement or replace the present federal punitory remedies and the state punitory and civil remedies for fraud. Each brief (Plaintiff's Brief, p. 26; Commission Brief, p. 30) points out that the time honored state remedies for fraud may sometimes present venue problems and that lack of uniformity may develop throughout the nation.[1]

[1] We suggest that it may take fifty years and a dozen or two appeals to this Court before the various district and circuit courts of appeal in our federal system will achieve full uniformity in solving the multitude of problems which will be raised under Section 14 if its doors are opened as widely as the Plaintiff and the Commission here seek.

In advocating the creation of more remedies, both briefs emphasize only the state court actions for fraud and completely ignore the existence of an important state court remedy which the Plaintiff enjoyed in Wisconsin. This remedy is also found in the merger laws of virtually all the states. We refer to the appraisal statute, Wis. Stats. 180.69 (see Case Brief 40). Under this law, all the Plaintiff had to do if he did not like the proposed merger was to make a written objection to it, and if no settlement was reached, he could have petitioned the court to appraise his stock at the fair value as of just before the merger, and the company would then have been required to buy his stock from him at that price. What could be simpler and what could be fairer? Why, with such a simple and efficacious state civil remedy available to the dissatisfied stockholder, as well as the federal punitory remedies and the state punitory and civil remedies for fraud should we struggle to cudgel up by implication a new federal private remedy which would have the effect of unsettling and disrupting corporate structures pending the ordeal of long litigation?

The Solicitor General's brief argues particularly that the Commission feels the need for a private retrospective remedy and that therefore this court should obligingly seek to supply it in the statute by implication. This approach we challenge. In the first place this is an argument better addressed to Congress for amending the Act than to a court. While it is, of course, true that more and higher penalties may tighten enforcement, as no doubt would life terms in jail for a violation, it must be recognized that beyond a point, policing of proxy statements becomes self-defeating: The opening of the door to strike suits brought by any stockholder in every merger where companies listed on an exchange are involved will certainly have most untoward consequences.

The Commission might well be reminded that its responsibility does not begin and end with proxy statements, but that its fundamental objective is to protect the investor. It does not further this protection by urging a tightening of its proxy rules enforcement where the result will subject every merger of every company whose shares are listed on an exchange to easy attack in a strike case brought by a holder of a minor stock interest in the cloak of a class suit. As we suggested in our main brief, no merger under this wide open plan may be regarded as accomplished until all strike suits have first been disposed of. It would seem inevitable that the stockholders of such companies will be plagued with burdensome expense, uncertainty, and delays as a result of the reduced utility of the proxy device, and that the officers' and directors' attention will be diverted from their business into a difficult and continuing study of which is the cheaper and better way to get rid of a strike suit, namely, by litigating it over the years or by buying it off.

IV. THE APPLICABILITY OF THE WISCONSIN STATE SECURITY FOR EXPENSE STATUTE (POINT II OF PETITIONER'S BRIEF) IS NOT ONLY INHERENT IN THE QUESTION PRECISELY AS WORDED IN THE PETITION FOR CERTIORARI BUT ALSO IS A "SUBSIDIARY QUESTION FAIRLY COMPRISED" IN THE PETITION.

The Plaintiff has attempted to limit the scope of the question presented to this Court by alleging that the question of the applicability of the Wisconsin Security for Expenses statute was not properly raised in the Petition for a Writ of Certiorari. This narrow interpretation of the Petition is unwarranted.

Supreme Court Rule 23(1)(c), which is relied upon by the Plaintiff states that the Petition for a Writ of Certiorari shall contain:

> "The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the Court."

The question as stated in the petition is whether a federal cause of action for rescission or damages is created by the Securities Exchange Act. This question necessarily subsumes the question of the scope and nature of such cause of action if this Court decides that one exists. The Seventh Circuit did not simply hold that a federal action exists, it held that a federal action exists to which the state statute is inapplicable. The cause of action, if any, cannot exist *in vacuo* under our federal system:

> "When federal law, instead of simply regulating the exercise of state authority, turns to take up itself the task of affirmative governance of private activity, it might be supposed that state law would cease to play a significant part * * * save only at the periphery marking the outer bounds of federal power. Precisely the contrary is true. It is in this sphere that the essentially incomplete and interstitial nature of federal law is most conspicuously revealed." Hart, "The Relations between State and Federal Law", 54 Colum. L. Rev. 489, 525 (1954).

The applicability of state law to a cause of action created by Federal statute must always be decided where Congress has not specifically pre-empted the field or specifically incorporated state law. As stated by Mr. Justice Jackson

in *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144, 153-154 (1944):

> "Simplicity of administration is a merit that does not inhere in a federal system of government, as it is claimed to do in a unitary one. A federal system makes a merit, instead, of the very local autonomy in which complexities are inherent. * * *. The existence and force and function of established institutions of local government are always in the consciousness of lawmakers and, while their weight may vary, they may never be completely overlooked in the task of interpretation."

The relevance of the laws of the states is Congressionally recognized in the Rules of Decision Act, 28 U.S.C. § 1652 (1948).

In the analogous question of the application of state statutes of limitations to federally created causes of action where no federal time bar has been provided by Congress, the law is clear. Ever since this Court's decision in *Campbell* v. *Haverhill*, 155 U.S. 610 (1895) it has been settled that where Congress is silent as to time limitations for bringing an action, the statute of limitations of the state will be applied by the federal courts. Note, *Federal Statutes Without Limitations Provisions*, 53 Colum. L. Rev. 68 (1953). Similarly, where a state statute includes a limitation as to providing security for expenses the federal judiciary should look to state law unless Congress has indicated a contrary intent.

The Petition for a Writ of Certiorari clearly incorporates not only the question whether a cause of action exists under Section 14(a), but also the question of state limitation upon such cause of action. Thus, the Statement section deals with conflicting decisions of the District and Circuit Courts as to the applicability of the Wisconsin

Security for Expenses statute. Indeed, page 4 of the Statement, when describing the decision of the Circuit Court, states that that Court held:

> "... that Count 2 stated *a cause of action* arising under federal law *to which the state security for expense statute did not apply* and that the district court could award damages or other retrospective relief thereunder." (Emphasis added).

Further, the Reasons for Granting the Writ portion of the brief is divided into two parts. The first of these (Petition pages 8-11) addresses itself to the conflict of decisions between Courts of Appeals concerning the existence or non-existence of a federal cause of action. The second section (Petition pages 11-13) deals with the conflict of decisions on the question of the application of state law to such a cause of action in the event one is found to lie. Thus, the first sentence in the second Reason for Granting the Writ is as follows:

> "If it is determined that, absent a supporting legislative history and clear and unambiguous statutory authority, Congress did intend or the federal courts will recognize a private action for alleged violations of Section 14(a) of the Act, *it then becomes important to determine the limitations, if any,* upon the relief available under the Act." (Petition page 11, Emphasis added).

The second Reason for Granting the Writ goes on to say:

> "• • • plaintiff's claim under Count II in the instant case cannot be adjudicated without reference to and reliance upon the Wisconsin statutory law and the organic law of the corporation." (Petition page 12).

Thus, both issues, which are spelled out in detail in the Questions Presented section of Petitioner's brief on the merits, were explicitly raised in the Petition which this Court granted.

It is true, as the Plaintiff has asserted, that the practice of this Court has been to refuse to consider questions not raised in the petition. This self-imposed limitation of review is, of course, a matter of practice rather than the power of the Court. Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, § 418 (1951). However, that practice is not applicable in the present circumstances. The cases upon which the Plaintiff relies deal with questions which cannot by any stretch of the imagination be considered "subsidiary question[s] fairly comprised" in the questions raised by the petition for certiorari.[1]

The Petitioners are confident that the Court will interpret its Rule in light of its purpose.

> "The purpose of requiring a statement of the Questions Presented is, of course, to apprise the Court and the respondent of the issues which the petitioner is seeking to have reviewed." Stern & Gressman, *Supreme Court Practice*, § 6-42 (3d Ed. 1962).

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[1] In *Local 1976, United Bro. of Carpenters* v. *NLRB*, 357 U.S. 93 (1958), petitioner sought, in his brief on the merits, to raise questions of the capacity of an agent and the sufficiency of evidence as questions to be decided before this Court could reach the question of the relation between a hot cargo clause in the collective bargaining agreement and the charge of an unfair labor practice, which was the question presented in the Petition for Certiorari. Similarly, in *Irvine* v. *California*, 347 U.S. 128 at 129 (1954), the petitioner, who had applied for certiorari on the ground that evidence submitted in a state criminal prosecution was unconstitutionally obtained, thereafter attempted to raise questions in his brief on the merits relating to the instructions to the jury and the applicability of a California Immunity statute which, he maintained, should have been applied by the California courts. Clearly, such questions are neither subsidiary to the questions presented by those petitions nor are they fairly comprised within such questions; the Plaintiff's cases are simply not in point.

We submit that the issues which Petitioner seeks to have reviewed are clearly set out in the Petition and that even by misreading the second point in the Petition, as the Plaintiff appears to have done, he is nevertheless sufficiently apprised of the issue presented by the Wisconsin Security for Expenses statute. That statute has been before the Courts in this case ever since petitioner first moved for security for expenses on April 7, 1958 (R. 153). The issue was considered and decided by both the District and Circuit Courts. The statute and the rulings concerning it are referred to throughout the Petition for Certiorari. There is no reason to assume at this point that the Plaintiff has been taken by surprise to find that the Petitioner regards that statute as applicable and intends to enforce its rights under it.

If this Court were to limit the scope of its review in deference to the Plaintiff's narrow misreading of the review sought by the petition, the result could only lead to confusion and possibly to a second appeal to this Court. Certainly this question would arise in future cases probing the dimensions and nature of the federal action created here. A decision that a federal cause of action under the Securities Exchange Act exists without a ruling as to the applicability of state law would leave the District Court without guidance on this important question.

We submit that the question has been properly raised and is now before this Court under its writ.

V. THE WISCONSIN SECURITY FOR EXPENSES STATUTE IS CONSTITUTIONAL.

On the issue of constitutionality raised by the Plaintiff (p. 48), only a brief reply is necessary.

The Plaintiff seems to assert that the Wisconsin requirement for giving security for expenses is something of

novel origin and limited in the state laws to derivative actions. We would only remind the court that security for expenses is a customary requirement in the issuing of restraining orders or temporary injunctions and that the procedure is also utilized in replevin proceedings, and also in many other applications in both civil and criminal state and federal law.

The Plaintiff also seems to assume in his argument that the court in fixing the bond will be unreasonable and arbitrary and, hence he argues the statute is arbitrary and unconstitutional. Is it not fairer to assume that the court will only fix a reasonable bond? Is it arbitrary and unconstitutional when a Plaintiff without a substantial investment brings an action seeking to declare void a merger of two companies with the equities of, perhaps, thousands of stockholders involved, all of whom are satisfied with the merger, for the court to require a reasonable security for expenses from the dissatisfied stockholder who is beclouding the integrity of a merger and impairing the value of the holdings of the other stockholders?

Further, the Plaintiff argues as if a derivative lawsuit were his only remedy and hence that the requirement for a bond deprives him of all relief (pp. 49, 54). This is distinctly not the case. If he has been cheated he can bring his state actions for fraud, and as has been already pointed out, if he was dissatisfied with the merger, by using the Wisconsin appraisal provision, he could have obtained the full pre-merger value of his stock by a very simple remedy (see Wis. Stats. 180.69). (Case Brief 40), and he could then have reinvested the proceeds in the stock of his choice among the thousands of different issues listed on the exchanges.

Finally, we submit that Plaintiff's constitutionality question has been put to rest by *Cohen* v. *Beneficial Industrial Loan Corp.* 337 U.S. 541 (1949) where the subject is fully discussed.

CONCLUSION.

The Court should reverse the Court of Appeals and order Count II of the complaint stricken in its entirety.

Respectfully submitted,

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